from a suit for indemnity. And if in suits strictly for indemnity against loss, caused by breach of covenant or of warranty, counsel fees and other expenses of litigation not embraced in the taxable costs may be embraced; it seems to us they should be in actions for compensation for malicious injuries.

I. F. R.

Supreme Court of Errors of Connecticut.

FIRST NATIONAL BANK *v.* NEW MILFORD.

C., who was at the same time treasurer of a town and cashier of a bank, took $3000 from the funds of the bank for his own use and executed a note to the bank for the amount as treasurer of the town, the note being entered upon the books of the bank in the same manner with other notes taken for money loaned. C. was the principal financial manager of the bank, and had been allowed and accustomed to make loans at his discretion without consulting the directors. He had already, without their knowledge, embezzled the funds of the bank to a large amount. The town had been in the habit of borrowing money at this bank and elsewhere, and upon notes executed by the town treasurer, and these loans had been reported to the town in the annual reports of the treasurers, which reports had been accepted by the town. Occasional votes of the town for thirty years had authorized the treasurers to borrow money for the use of the town, generally for some particular purpose; but except in one instance the treasurers had acted under the direction of the selectmen of the town. In a suit by the bank against the town upon the note, it was *held:*—

1. That the votes of the town and the reports of the town treasurers were admissible in evidence upon the question of the authority of C. to borrow money for the town.

2. (By a majority of the court.) That as C. was engaged in an extensive fraud upon the bank, and in view of all the facts, it was fairly presumable that he made the note in the form in which he did as a false representation and cover by which to perpetrate a fraud on the bank, and with no intention to bind the town.

3. But that, if he intended to bind the town, his own fraud as treasurer was known to him as agent of the bank, and was therefore the knowledge of the bank, and that the plaintiffs therefore could not recover.

ASSUMPSIT on a note of $3000, dated December 28th 1866, executed by "J. J. Conklin, treasurer of the town of New Milford," payable to the plaintiffs or their order on demand, and held by them; tried in the Superior Court on the general issue closed to the court. The following facts were found by the court:—

At the time the note was executed Conklin was treasurer of the town of New Milford, and had been such from the year 1860

with the exception of one year, and continued to be so until September 1867, and was also the cashier of the bank of the plaintiffs from the year 1858 down to September 1867. He executed the note on the day of its date, and then drew the money on it from the bank, but appropriated the money to his own use and not to the use of the town, and the town had no benefit from it. The money was used by him in private speculations in New York. He also used funds of the bank about that time in his own private speculations to the amount of about $50,000, and eventually lost the same. The misappropriation of these moneys first became known to the bank, the town, and the public in September 1867.

None of the selectmen or other officers of the town had any knowledge of the existence of the note in suit until September 1867, when the defalcations became public. At the date of the note there was on hand in the treasury of the town about $1385, and the town was not then in want of money. The note was regularly entered in the books of the bank by Conklin, and was filed by the clerk and placed among the papers of the bank of a similar kind. It was, and long had been, the practice of the cashier to discount paper and to cash notes without consulting the directors, and he was, and long had been, the principal financial officer of the bank.

The annual reports of the treasurers of the town from the year 1859 to the year 1866 inclusive, showing numerous cases of money borrowed by the treasurers, which reports were accepted by the town, were read in evidence by the plaintiffs, the defendants excepting to the same. Some of these loans had been obtained at the plaintiff's bank. Numerous votes of the town with regard to borrowing money for the use of the town were also put in evidence by the plaintiffs, extending back for thirty years before the year 1866, in many of which the town treasurer was authorized to borrow money for the wants of the town, the amount generally being limited, and in most cases the object for which the money was to be borrowed being stated. In connection with these reports and votes the plaintiffs proved that whenever money was borrowed by the town the uniform practice had been for the treasurer to make notes therefor, which were usually in form substantially like the one in suit, and that all these notes, except the one in suit, had been paid by the town; but it appeared that

in every case but one the treasurer acted by the direction and under the advice of the selectmen, the direction being oral and the selectmen not usually communicating in person with the lender. There was no proof that the selectmen had directed the treasurers to borrow money when there was money in the treasury sufficient to meet present wants, or when the money was not needed for the use of the town.

Upon these facts the plaintiffs claimed that Conklin, as treasurer, had authority to bind the town by the note in suit, and that the town had held their treasurers out to the world as so authorized, and upon all the facts the plaintiffs claimed that they were entitled to recover on the note.

The defendants objected to all the evidence offered by the plaintiffs to prove the authority of Conklin to bind the town by implication, or in any way except by express authority; and the defendants claimed from the votes so offered in evidence by the plaintiffs that Conklin had no authority to make and deliver the note in question without the direction of the selectmen, and that the note was, as to the defendants, without consideration, and that Conklin committed a fraud in the execution of it, and that the plaintiffs were bound by his acts, and had notice of his fraud and of the want of consideration through Conklin as their cashier and agent; and also had notice in the same way that the moneys received by him as the avails of the note were for his own use and not for the use of the defendants, and that he had no authority to bind the town to the payment of the note without the direction of the selectmen. And the defendants for these reasons claimed that they were not liable in the action, and that the note was never executed by them.

The question whether the evidence objected to was admissible, and the question what judgment should be rendered in the case, were reserved for the advice of this court.

O. S. Seymour and *E. W. Seymour*, for the plaintiffs.

Graves and *McMahon*, for the defendants.

BUTLER, J.—The facts in this case are very simple and the law is equally so, and there is no aspect of them under which the defendants can be subjected upon the note.

Conklin was treasurer of the town, and cashier and loan officer

of the bank. It is immaterial whether or not he had authority, as treasurer of the town, to draw the note and obtain the loan without the advice and assent of the selectmen, if the money had been needed by the town. And immaterial whether the evidence offered and objected to was admissible or not. As the point is made, however, we decide that it was admissible.

Whether he had authority to make a loan or not is immaterial, because it is found that the town was not in want of the money, that the treasury was supplied, and that he intended the money for his own use, and therefore, that if he intended to pledge the credit of the town, the act was a gross fraud upon the town.

Did he then intend to pledge the credit of the town to the bank? A majority of the court think not. Conklin was then engaged in an extensive embezzlement of the funds of the bank, and liable to detection by its officers if they examined its accounts. That fact, and the form of the note, and the presumption that he would not unnecessarily commit another offence, and that he would not contemplate going through the unnecessary form of contracting by himself, as treasurer of the town, with himself as financial officer of the bank, under the circumstances in which he was placed, indicate that he drew the note, entered it in the books, and caused it to be filed by the clerk, as a false representation and cover, precisely as he made other false representations and false entries, intending to restore the money and take out the note, and not intending to onerate the town. If that is so, there was no meeting of minds and no purchase of the note or contract of loan which will sustain this action.

Assuming, however, that there was a contract of loan, it was made by Conklin as agent of the town with Conklin as agent of the bank. If Conklin, as agent of the town, had applied to the directors for a loan, offering the note and telling them that he had drawn it, not for the benefit of the town, but for his own benefit, without consulting the officers of the town, and when there was a sufficient supply of money in the treasury, it must be conceded that the board would in making the loan have been *particeps criminis* in the fraud, and the bank could not recover in this action. We cannot perceive that that case would differ from this. The contract, if any was made, was made by Conklin on behalf of the bank. No other mind but his met the mind of the agent of the town in making the contract. He as agent of the bank

had full knowledge therefore of the fraud; and now the bank, if they ratify his contract and confirm his agency, must accept his knowledge and be bound by it, precisely as if the loan had been made and the knowledge had by the board of directors.

We think it very clear, therefore, in whatever aspect the case may be viewed, that the note in question is not a valid note against the town in the hands of the plaintiffs, and judgment must be advised for the defendants.

In this opinion the other judges concurred.

The principal question involved in the foregoing case is one of great importance, and one which seems at different times to have produced more or less confusion in the minds of very learned jurists and able judges. The question stripped of all disguise and evasion is simply this: how far the principal and his agent must be regarded as one in the consummation of such acts as one may bindingly do through the instrumentality of others. There are a certain class of writers and experts in the law, who seem to regard it as a very creditable thing to devise some expedient whereby one man may commit a very grievous fraud and wrong upon another, through the misrepresentations of an agent, wholly impossible in regard to ability himself to respond for the damages, and at the same time take all the benefits and repudiate all the responsibilities for the wrongful acts whereby such benefits were secured. *Cornfoot* v. *Fowke*, 6 M. & W. 358, is an eminent instance of this kind, which produced such flagrant injustice as to shock the sensibilities of every right-minded man; but which has been attempted to be sustained upon numerous evasions and refinements, during the life of its estimable author, the late Lord CRANWORTH, and will probably now fall into its merited oblivion. But since that decision the English courts have discussed the question, how far the knowledge of the agent of any purposed fraud must affect the principal although ignorant of such purpose, and it seems now conceded, that the knowledge of the agent is the knowledge of the principal, without regard to the mode of its acquisition or the fact of its being communicated to the principal: *Dresser* v. *Norwood*, 14 C. B. N. S. 574; s. c. in Exchequer Chamber, 10 Jur. N. S. 851, 17 C. B. N. S. 466. The same rule is maintained in *Hart* v. *The Bank*, 33 Vt. 252.

But the principle of the decision in *Cornfoot* v. *Fowke*, *supra*, is, if possible, still more shocking to the sense of justice than that of those just alluded to, where the principal is wholly innocent of all guilty knowledge, and is made responsible for that of his agent acquired in a different transaction, and not communicated to the principal. In *Cornfoot* v. *Fowke* the principal knew himself of a defect in the dwelling, which rendered it uninhabitable by decent people, being next door to a brothel of the worst kind, and still withheld this knowledge from his agent with a view to enable him innocently to obtain a tenant. Well might Lord St. LEONARDS say, as he did, in *Nat. Exch. Co.* v. *Drew*, 2 Macqueen (H. of L.) 103, "I should be very much shocked at the law of England, if I could bring myself to believe it would not reach the case of a person so availing himself of a misrepresentation of his own agent." One would almost

suppose there must be something peculiar in the organization or habits of a human being who could come to any other conclusion. The English courts, in a late case, *Proudfoot* v. *Montefiore*, Law Rep. 2 Q. B. 511, have *held* that where an agent, the master of a ship, withholds knowledge of its loss from the owner, that he may be in condition to effect insurance which he does, the policy is void, overruling the case of *Ruggles* v. *Insurance Co.*, 4 Mason 75, s. c. 12 Wheat. 408. I. F. R.

Court of Appeals of Kentucky.

PETER BLYNN *v.* THE COMMONWEALTH OF KENTUCKY.

A statute which directs that notice of a special criminal term "shall be posted up at the court-house door ten days before its commencement" is directory only, and a person convicted at such term, notice of which was posted only *eight* days, is not, for that reason, entitled to a new trial.

Drunkenness may, under peculiar circumstances repelling malice, reduce the grade of the crime of homicide from murder to manslaughter.

THE appellant was indicted, tried and convicted of murder, at a special session of the Boone Circuit Court. The term of the court was ordered in vacation, only a few days after the homicide, and commenced on the eighth day after the order was made. The other facts are sufficiently stated in the opinion.

John L. Scott, for appellant.

John Rodman, Attorney-General, for the Commonwealth.

The opinion of the court was delivered by

ROBERTSON, J.—The defendant's appeal to this court, urging various objections to the judgment, asserts, *in limine*, that the special term, held without the notice prescribed by law, was illegal, and that for want of jurisdiction the verdict and judgment against him are void.

If, as assumed, the sentence was not a judicial act, this court cannot judicially revise and reverse it, and the appellant's only lawful appeal would be to another department of the government, not fettered as this court is, by inexorable law. But in our judgment the Circuit Court had jurisdiction to order the grand jury and special juries to try the appellant on the indictment found by that grand jury, and to sentence him to be hung on the verdict of "guilty" by that chosen *venire*. The following quotation